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CLERK U.S. BANKRUPTCY COURT
Central District of California
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**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re:

David MacMillan and Cynthia Barrett Martin,

Debtors

Case No.: 2:16-bk-21559-NB

Chapter: 7

Substantively Consolidated with Case No.:
2:17-bk-11588-NB

In re:

Attitude Marketing, Inc.,

Debtor

Jointly Administered with
Case No.: 2:19-bk-10552-NB

Chapter: 7

**MEMORANDUM DECISION RE
(1) OBJECTION TO DEBTOR DAVID
MACMILLAN'S AMENDED SCHEDULE C;
AND (2) MOTION FOR TURNOVER OF
ESTATE PROPERTY AND ACCOUNTING**

Hearing:

Dates: 5/21/19, 6/4/19, 7/2/19, 8/6/19,
8/20/10, 9/24/19

Place: Courtroom 1545

255 E. Temple Street,
Los Angeles, CA 90012

For the reasons set forth below, this Court is denying the objection to debtor
David MacMillan's amended bankruptcy Schedule C. This Court is granting, with

1 alternate forms of relief, the Trustee's motion for turnover of estate property and
2 accounting. Appearances at the above-referenced hearings were as noted on the
3 record.¹

4 **1. BACKGROUND**

5 **a. MacMillan bankruptcy case**

6 David MacMillan ("MacMillan") filed a voluntary Chapter 11 bankruptcy petition
7 on August 30, 2016 (Case No. 2:16-bk-21559-NB) ("MacCase"). On September 27,
8 2016, MacMillan filed his bankruptcy Schedule B, which listed his interest in a 2014
9 Porsche Cayenne (the "Porsche Cayenne") with an alleged fair market value of
10 \$57,000. MacCase, dkt. 29. MacMillan's bankruptcy Schedule D listed a secured claim
11 of \$59,190 against the Porsche Cayenne. *Id.* MacMillan did not claim an exemption in
12 the Porsche Cayenne on his bankruptcy Schedule C. *Id.*

13 On April 12, 2017, the case was converted to chapter 7. MacCase, dkt. 175.
14 Shortly thereafter Rosendo Gonzalez was appointed to serve as the Chapter 7 Trustee
15 ("Trustee Gonzalez") and he continues to act in that capacity.

16 **b. Martin bankruptcy case**

17 On February 9, 2017, MacMillan's wife, Cynthia Barret Martin ("Martin," and
18 together with MacMillan, "Debtors"), filed a voluntary Chapter 13 bankruptcy petition
19 (Case No. 2:17-bk-11588-NB) ("MartinCase"). On March 7, 2017, Martin filed her
20 bankruptcy Schedule B, which listed her interest in a 2014 Porsche Boxster (the
21 "Porsche Boxster") with an alleged fair market value of \$32,000. MartinCase, dkt. 17.
22 Martin's bankruptcy Schedule D listed a secured claim of \$34,797.45 against the
23 Boxster. *Id.* Martin did not claim an exemption in the Porsche Boxster on her
24 bankruptcy Schedule C. *Id.*

25 On April 12, 2017, Martin's case was converted to chapter 7. MartinCase, dkt.
26 26.

27 ¹ Unless the context suggests otherwise, a "chapter" or "section" ("§") refers to the United States Bankruptcy Code,
28 11 U.S.C. § 101 et seq. (the "Code"), a "Rule" means the Federal Rules of Bankruptcy Procedure or other federal or
local rule, and other terms have the meanings provided in the Code, Rules, and the parties' filed papers.

1 **c. Attitude Marketing, Inc., bankruptcy case**

2 On January 18, 2019, Trustee Gonzalez filed a voluntary Chapter 7 bankruptcy
3 petition for Attitude Marketing, Inc. ("Attitude"), an entity owned and controlled by
4 Debtors (Case No. 2:19-bk-10552-NB) ("AttitudeCase").

5 **d. Two individual debtors' cases substantively consolidated, and jointly**
6 **administered with Attitude case**

7 On September 18, 2017, this Court entered an order substantively consolidating
8 the MacMillan and Martin cases and designating the MacMillan case as the lead case.
9 MacCase, dkt. 245. On February 12, 2019, this Court entered an order authorizing the
10 joint administration of the Attitude case with the consolidated MacMillan/Martin Cases.
11 AttitudeCase, dkt. 18.

12 **e. Turnover Motion**

13 On April 22, 2019, Trustee Gonzalez filed a "Motion for Turnover of Estate
14 Property and Accounting" (MacCase, dkt. no. 355) (the "Turnover Motion"), pursuant to
15 which Trustee Gonzalez sought an order requiring the Debtors (i) to turn over the
16 Porsche Cayenne and Porsche Boxster (together, the "Porsches"); and (ii) to provide an
17 accounting for three Lotuses, which appeared to have been disposed of pre- and
18 postpetition.

19 The matter was fully briefed (MacCase, dkt. 355, 356, 361, 362), and, in advance
20 of the May 21, 2019 hearing, this Court issued the following tentative ruling:

21 **Tentative Ruling for 5/21/19:**

22 Appearances required.

23 (1) Current issues

24 (b) Chapter 7 Trustee's motion for turnover and accounting ("Turnover
Motion," In re MacMillan, Case No. 2:16-bk-21559-NB, dkt. 355, 356),
Opposition Declaration (dkt. 361), Reply (dkt. 362)

25 Grant as set forth below.

26 * * *

27 The tentative ruling is that Trustee has established on a *prima facie* basis
28 that Debtors had an ownership interest in two Porsches and three Lotus
vehicles, and the burden is on Debtors to establish that they no longer have
such an interest. The tentative ruling is that Debtors have only met that

1 burden with respect to one vehicle (the Lotus as to which there is evidence of
2 a sale to Debtor MacMillan's brother).

3 First, as a procedural matter, Debtors had an opportunity to respond to the
4 Turnover Motion by the deadline established by the Local Bankruptcy Rules;
5 they did not request additional time to respond; and, even if they had made
6 such a request, they have not (on the present record) established any cause
7 to be granted additional time. Second, based on the limited evidence provided
8 by Debtors, they have not rebutted the Trustee's *prima facie* showing (except
9 as to the one vehicle noted above).

10 For example, it appears that Debtors are the owners of record for at least
11 three Lotus race cars - two Lotus Evoras and one Lotus 211. Dkt. 332, p. 6.
12 Debtor MacMillan's declaration (dkt. 361) provides very little information about
13 these vehicles.

14 Debtor MacMillan asserts that one Lotus vehicle was totaled around
15 February 2012 (dkt. 361, p.3, para. 9), and that he no longer has any
16 paperwork relating to that vehicle. But (i) the one photograph that he provides
17 (allegedly of the subject vehicle) does not appear to show that it was totaled;
18 (ii) he fails to explain why he lacks any paperwork; and (iii) normally one would
19 expect to have paperwork regarding the loss of such a valuable vehicle, such
20 as insurance papers, or tax returns for Debtor MacMillan or one of his
21 businesses showing a write-off based on loss of the vehicle, or other records
22 and documents. Although it is conceivable that there are explanations and
23 documents that would establish that Debtor MacMillan does not still own this
24 vehicle, he has not met his burden
25 to rebut the Trustee's *prima facie* showing, and the deadline to do so has
26 passed.

27 In addition, although the tentative ruling is that Debtor MacMillan has met
28 his burden insofar as the unregistered 2011 Lotus Evora that allegedly was
29 sold to his brother by Rasco/Racso (the spelling is unclear) in March 2016
30 (dkt. 361, p. 3, para 12), it appears that the Lotus Evora sold to Debtor's
31 brother is not the same Lotus Evora mentioned in para. 10 (see dkt. 362,
32 p.2:22-28). There is no evidence to rebut the *prima facie* showing as to that
33 Lotus vehicle. Nor is there any evidence to rebut the *prima facie* showing as
34 to the two Porches. Nor has Debtor Martin filed anything in response to the
35 Turnover Motion.

36 The tentative ruling is to direct Debtors to turn over the two Lotus vehicles
37 and the two Porches to the Chapter 7 Trustee, together with all associated
38 papers and materials (e.g., car keys), **no later than 5/28/19**, or be subject to
39 possible sanctions. This Court recognizes that, if Debtors truly do not possess
40 some of these four vehicles, or if those vehicles belong to another entity, then
41 perhaps they will be unable to turn over the vehicles despite any order of this
42 Court directing them to do so. But the tentative ruling is that, having chosen
43 not to take the Turnover Motion seriously enough to rebut the Trustee's *prima*
44 *facie* showing, or to request additional time to do so, Debtors have waived and
45 forfeited that opportunity, and the Turnover Motion must be granted.

Debtors' apparent remedy will be (i) to seek reconsideration (e.g., under Rule 9023), or, (ii) if they are held in contempt for violating the Turnover Motion, to meet their burden to show impossibility (or to establish any other viable defense to a finding of contempt). The parties should be prepared to address the present location and condition of the vehicles, where the Trustee needs them to be delivered, and any other specifics that this tentative ruling does not address.

After consideration of oral arguments, this Court orally granted the Turnover Motion in part, ruling that the Debtors must turn over the Porsches, but deferred making any decision on when the turnover must occur, and deferring making a decision with respect to the Lotuses to allow the Debtors time to provide Trustee Gonzalez with additional documentation accounting for the disposition of those vehicles. This Court set a continued hearing date of June 4, 2019 to determine the outstanding issues and directed the parties to file supplemental briefing.

On May 31, 2019, Debtors filed a supplemental declaration with additional evidence. MacCase, dkt. 369. MacMillan also filed an amended bankruptcy Schedule C asserting an exemption in the Porsche Cayenne up to the fair market value of the vehicle pursuant to C.C.P. § 703.140(b)(1), (b)(2), and (b)(5). *Id.*, dkt. 370. On June 1, 2019, Trustee Gonzalez Trustee filed a supplemental response. *Id.*, dkt. 371. At the June 4th hearing, Trustee Gonzalez appeared through counsel and represented that he was satisfied with Debtors' evidence regarding the disposition of two of the Lotuses but requested a further continuance to complete his investigations with respect to the third Lotus and to allow him an opportunity to inspect the Porsches to determine their fair market value. Accordingly, this Court continued the hearing to July 2, 2019 and set a June 18, 2019 deadline for supplemental briefing. On June 18, 2019, Debtors submitted a supplemental declaration. *Id.*, dkt. 379.

On July 1, 2019, creditor Wyndham Vacation Resorts, Inc. ("Wyndham") filed an objection to MacMillan's claim of an exemption in the Porsche Cayenne (MacCase, dkt. 387) (the "Wyn. Exemption Objection"). Accordingly, this Court continued the hearing to August 6, 2019, to allow for concurrent resolution of the Wyn. Exemption Objection.

1 On July 30, 2019, Trustee Gonzalez filed a supplemental reply in support of the
2 Turnover Motion representing that he had agreed to accept Debtors' values for the
3 Porsches (*i.e.* \$29,000 for the Porsche Cayenne and \$27,000 for the Porsche Boxster)
4 and was willing to allow Debtors to buy-out the estate's interest in those vehicles for
5 \$37,349 after giving them a credit for their exemption claims.² MacCase, dkt. 397. But
6 Trustee Gonzalez acknowledged that the Wyn. Exemption Objection complicated the
7 issue and, if sustained, would require Debtors to pay more to retain the Porsches, or
8 else to comply with this Court's prior order requiring them to turn over the vehicles. *Id.*

9 Accordingly, this Court deferred issuing a final ruling on the remaining turnover
10 issues pending a determination of the Wyn. Exemption Objection.

11 **f. Wyn. Exemption Objection**

12 Wyndham advances two arguments in support of disallowing MacMillan's claimed
13 exemption in the Porsche Cayenne.

14 First, Wyndham argues that it is unclear whether the Porsche Cayenne is
15 property of the MacMillan estate or the Attitude estate. Wyndham asserts that, although
16 MacMillan scheduled the Porsche Cayenne and testified that Attitude made the loan
17 payments on the Porsche Cayenne as part of his employment compensation package,
18 MacMillan did not reflect that income in his tax returns as required by applicable law.
19 Wyndham further highlights that, in addition to paying the vehicle loan, Attitude listed
20 the Porsche Cayenne as an asset on its tax returns. Therefore, Wyndham argues that
21 the best available evidence supports a finding that Attitude is the equitable owner of the
22 Porsche Cayenne and, as a result, MacMillan cannot exempt it as an asset of his
23 estate. MacCase dkt. 387.

24 Second, Wyndham argues in the alternative that even if this Court determines
25 that the Porsche Cayenne is property of MacMillan's estate, he should be equitably
26 estopped from amending his bankruptcy Schedule C to exempt the Porsche Cayenne.

27 ² Trustee Gonzalez made no reference to the other vehicles, so this Court presumes that he is satisfied
28 by Debtors' evidence and his own investigations and is not asking this Court to make any further
determinations with respect to those vehicles.

Wyndham asserts that Trustee Gonzalez deposed MacMillan on January 10, 2019, two weeks after Attitude paid off the loan on the Porsche Cayenne, and that when questioned about the existing debt on the vehicle MacMillan intentionally failed to disclose that it was no longer encumbered by any liens. Wyndham further argues that given MacMillan's complete ownership and control over Attitude he cannot reasonably argue that he was unaware of the equity in the Porsche Cayenne at the time of his deposition and that his intent to induce Trustee Gonzalez into not pursuing that equity is further supported by MacMillan's failure to amend his schedules to reflect the satisfaction of that debt. Therefore, Wyndham argues that MacMillan is equitably estopped from claiming the exemption. MacCase dkt. 387.

On July 23, 2019, Macmillan filed an opposition to the Exemption Objection arguing that the objection should be overruled as follows. MacCase, dkt. 389. First, MacMillan asserts that he did not initially claim an exemption in the Porsche Cayenne because when he filed his bankruptcy petition the balance of the vehicle loan exceeded its fair market value so there was no equity to exempt. But, once the loan was paid off and there was equity that he could exempt, he filed an amended bankruptcy Schedule C. MacMillan contends that there was no bad faith conduct and that Rule 1009 permits debtors to freely amend their schedules. Next, MacMillan argues that under applicable law, this Court may not use its equitable powers to disallow an exemption based on a debtor's wrongful conduct. Finally, MacMillan argues that there is no ambiguity with respect to ownership of the Porsche Cayenne because title and registration are in his name as evidence by documents attached to his supplemental declaration submitted in response to the Turnover Motion. See MacCase, dkt. 369, Ex. 6.

2. JURISDICTION, AUTHORITY, AND VENUE

This Bankruptcy Court has jurisdiction, and venue is proper, under 28 U.S.C. §§ 1334 and 1408. This Bankruptcy Court has the authority to enter a final judgment or order under 28 U.S.C. § 157(b)(2)(B) & (E). See *generally Stern v. Marshall*, 131 S. Ct. 2594 (2011); *In re AWTR Liquidation, Inc.*, 547 B.R. 831 (Bankr. C.D. Cal. 2016)

(discussing *Stern*); *In re Deitz*, 469 B.R. 11 (9th Cir. BAP 2012) (same). Alternatively, the parties have expressly and implicitly consented to this court's entry of a final judgment or order. See *Wellness Intern. Network, Ltd. v. Sharif*, 135 S.Ct. 1932 (2015); and see *In re Pringle*, 495 B.R. 447 (9th Cir. BAP 2013). See also LBR 9013-1(c)(5) & (f)(3).

3. DISCUSSION

a. Wyndham's objection to MacMillan's claimed exemption in the Porsche Cayenne is overruled

i. Applicable standard

A claimed exemption is "presumptively valid." *In re Diener*, 483 B.R. 196, 203 (9th Cir. BAP 2012) (citing *In re Carter*, 182 F.3d 1027, 1029 n.3 (9th Cir. 1999)). Once an exemption has been claimed, it is the objecting party's burden to prove by a preponderance of the evidence that the exemption is not properly claimed. *Id.* (citing Rule 4003(c); *In re Kelley*, 300 B.R. 11, 17 (9th Cir. BAP 2003)). Initially, this means that the objecting party has the burden of production and the burden of persuasion. *In re Carter*, 182 F.3d at 1029 n.3. The objecting party must produce evidence to rebut the presumptively valid exemption. *Id.* If the objecting party can produce evidence to rebut the presumption, the burden of production then shifts to the debtor to come forward with unequivocal evidence to demonstrate that the exemption is proper. *Id.* The burden of persuasion, however, always remains with the objecting party. *Id.*

ii. The evidence in the record establishes that the Porsche Cayenne is property of the MacMillan estate

Section 541(a) provides that, upon the filing of a petition in bankruptcy, an estate is created comprised of "all legal or equitable interest of the debtor in property as of the commencement of the case." In this case, MacMillan submitted a Certificate of Title establishing that he is on record title for the Porsche Cayenne. See MacCase, Declaration of David Macmillan, dkt. 369, Ex. 6. Pursuant to California Vehicle Code § 4450, upon registering the Porsche Cayenne with the state of California, a certificate

1 of title was issued to MacMillan as the "legal owner." Although the Certificate of Title is
2 dated January 23, 2019, Wyndham does not argue that title was ever in Attitude's
3 name. Rather, Wyndham argues that Attitude should be determined to be the equitable
4 owner of the vehicle because it paid the car loan and listed it as an asset on its tax
5 returns. Whether the MacMillan and Attitude tax returns contain inaccurate information
6 about the characterization of Attitude's car loan payments and/or MacMillan's
7 employment income is not for this Court to decide. But, in view of MacMillan's
8 evidence, there is insufficient conflicting evidence from Wyndham for this Court to be
9 able to find that the Porsche Cayenne is an asset of the Attitude bankruptcy estate.

10 **iii. Wyndham has not established that MacMillan should be estopped from**
11 **exempting the Porsche Cayenne**

12 Under Rule 1009(a), a debtor may amend his or her list of exemptions "as a
13 matter of course at any time before the case is closed." Although *Law v. Siegel*, 134
14 S.Ct. 1188 (2014), mandates that the bankruptcy court lacks federal authority to
15 disallow an amended exemption based on a debtor's bad faith, it does recognize that
16 when a debtor claims an exemption created under state law, the scope of the exemption
17 is determined under state law which "may provide that certain types of debtor
18 misconduct warrant denial of the exemption." *In re Smith*, 2017 WL 1457942, at *4 (9th
19 Cir. BAP Apr. 24, 2017). This could include any equitable doctrines under California law
20 to disallow an amended exemption, including equitable estoppel. *Id.* (citing *In re Gray*,
21 523 B.R. 170, 175 (9th Cir. BAP 2014); *In re Lua*, 529 B.R. 766, 775 (Bankr. C.D. Cal.
22 2015)).

23 To invoke equitable estoppel under California law, a party must show: "(a) a
24 representation or concealment of material facts; (b) made with knowledge, actual or
25 virtual, of the facts; (c) to a party ignorant, actually and permissibly, of the truth; (d) with
26 the intention, actual or virtual, that the ignorant party act on it; and (e) that party was
27 induced to act on it." *Smith*, 2017 WL 1457942, at *5 (quoting *Simmons v. Ghaderi*, 44
28 Cal. 4th 570, 584 (2008)) (emphasis added).

1 Wyndham argues that equitable estoppel applies because MacMillan
2 intentionally concealed the equity in the Porsche Cayenne from Trustee Gonzalez, both
3 by testifying that he did not know how much was still owed on the vehicle loan and by
4 failing to amend his schedules once the loan was paid off, with the intent to induce
5 Trustee Gonzalez to leave the asset unadministered. Wyndham asserts that Trustee
6 Gonzalez was ignorant of these facts and acted in reliance on that lack of knowledge.

7 Wyndham's argument fails because, regardless of whatever bad intent MacMillan
8 allegedly had, Wyndham has not established that Trustee Gonzalez was ignorant of the
9 potential equity in the Porsche Cayenne or that he was induced into not administering
10 the vehicle. In fact, the record shows that Trustee Gonzalez continued to investigate
11 whether there was any equity in the Porsche Cayenne and undertook steps to
12 administer that equity by filing the Turnover Motion.

13 Wyndham also appears to argue that MacMillan should be equitably estopped
14 from claiming an exemption in the Porsche Cayenne because he waited until after
15 Trustee Gonzalez filed the Turnover Motion to claim an exemption in the vehicle. But
16 this argument also fails because again Wyndham has not shown that Trustee Gonzalez
17 was ignorant of the fact that MacMillan might claim an exemption in the Porsche
18 Cayenne at any point prior to the closing of the case. *See e.g., Smith*, 2017 WL
19 1457942, at *14-15 (Rejecting trustee's equitable estoppel argument based on finding
20 that trustee was on "inquiry notice" that the debtors could still exempt asset in future).

21 For the foregoing reasons, Wyndham's objection to MacMillan's claimed
22 exemption in the Porsche Cayenne is overruled.

23 **b. The Turnover Motion is granted with respect to the Porsches**

24 For the reasons set forth above, and in view of Trustee Gonzalez's prior
25 representations that he was willing to accept \$37,349.00 from Debtors in exchange for
26 Debtors' ability to keep the Porsches, Debtors will be directed by separate order to pay
27 Trustee Gonzalez or else turn over the Porsches.
28


1 **4. CONCLUSION**

2 For the reasons set forth above, this Court overrules the Wyn. Exemption
3 Objection and grants Trustee Gonzalez's Turnover Motion with respect to the Porsches.

4 Debtors are directed to lodge a proposed order overruling the Wyn. Exemption
5 Objection, and Trustee Gonzalez is directed to lodge a proposed order granting the
6 Turnover Motion, in compliance with the applicable rules and procedures. Trustee
7 Gonzales is directed to include in the turnover order a deadline of 14 days after entry of
8 this Memorandum Decision for Debtors to tender to Trustee Gonzalez a check for
9 \$37,349.00, failing which Debtors are directed immediately to turn over the Porsches to
10 Trustee Gonzalez, on pain of being held in contempt of court (upon a proper motion).

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24 Date: November 12, 2019


Neil W. Bason
United States Bankruptcy Judge